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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68) is not yet reported. The orders and findings of the Civil Aeronautics Board (R. 6, 51, 62) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 77). The petition for a writ of certiorari was filed on July 31, 1953 and was granted on October 12, 1953 (R. 79). The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTIONS PRESENTED

Under Section 406 of the Civil Aeronautics Act, the Civil Aeronautics Board is empowered to fix "fair and reasonable" mail rates at a level which, together with the carrier's "other revenue", will enable the carrier "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." The questions presented are:

1. Whether, when domestic and international operating divisions of the same air carrier are classified as separate rate-making units, the Board mandatorily is required by Section 406 to reduce an otherwise "fair and reasonable" mail rate for one division by deducting revenue above a stated fair return on investment which has been earned from the operations of the other division.

2. Whether, in fixing "fair and reasonable" mail rates, the Board is precluded by Section 406 from declining, for developmental purposes, to reduce mail pay allowances by certain categories of "other revenue".

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra,* pp. 45 to 48.

STATEMENT

This case involves the validity of an order of the Civil Aeronautics Board which fixed a final mail

rate for a past period for the international operating division of Chicago and Southern Air Lines, Inc. (C. & S.). After the decision below, C. & S. was merged into Delta Air Lines, Inc. and C. & S.'s certificates were reissued to Delta. Delta was substituted as the intervenor below in lieu of C. & S. (R. 78), and presently is conducting operations over its prior routes and those of C. & S. as Delta-C. & S.[1]

At the time of the entry of the rate order under review in this case, C. & S. conducted domestic operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international operations extending between Houston-New Orleans and Caracas, Venezuela via Havana and Kingston. Both operations were certificated for the transportation of persons, property and mail. See *Chicago and Southern A. L., Mail Rates,* 9 C.A.B. 786, 789, 790 (1948); R. 7. 8. As is customary where a single carrier conducts both domestic and international operations of substantial size, the different divisions were treated by the Board as separate rate-making units for mail pay purposes, and different mail rates for the domestic and international divi-

[1] Certiorari to review the decision below also has been granted on the petition of Delta. *Delta Air Lines, Inc.* v. *Summerfield et al.*, No. 223. These petitions have been consolidated for hearing with the petitions in Case Nos. 224 and 225, wherein certiorari was granted to review the judgment of the Court of Appeals in the companion decision in *Summerfield et al.* v. *Civil Aeronautics Board,* Nos. 11259, 11324. *Civil Aeronautics Board* v. *Summerfield et al.*, Case No. 224; *Western Air Lines* v. *Civil Aeronautics Board et al.*, Case No. 225. The Board has filed a separate brief in these latter cases.

sions were fixed in separate proceedings before the Board, with appropriate allocations of costs and investment between the two divisions.

On July 28, 1948, the Board had fixed a final rate for the domestic operations to be effective on and after January 1, 1948. *Chicago and Southern A. L., Mail Rates,* 9 C.A.B. 786 (1948). The domestic rate was an incentive sliding-scale rate designed to yield a higher return with either decreasing costs or increasing load factors, and was fixed at a level which, on the basis of predictions of future operations, would yield a return after taxes of 7.4% on investment allocated to the domestic operations. 9 C.A.B. at pp. 811, 812. The carrier actually earned a return on domestic investment of 12.51% for the years 1948-1950, or $654,000 more than a return of 7.4% (R. 65).

C. & S. had inaugurated operations over its international routes in 1946, and temporary or provisional rates had been fixed for those operations (R. 8). The order here involved fixed a final rate for the international operations for the past period November 1, 1946-December 15, 1950, and a different final rate for a future period beginning December 16, 1950 (R. 58, 59). Section 406(b) of the Act (*infra,* p. 47) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and continue the development of air transportation to the extent and of the character and quality

required for the commerce of the United States, the Postal Service, and the national defense." The Postmaster General contended before the Board that the $654,000 above a 7.4% return earned under the final domestic rate represented "excess profits" which, under the quoted statutory provisions, were required to be deducted as "other revenue" from the international mail pay allowance to which the carrier otherwise was entitled.

The Board held, however (R. 54):

> * * * while we are required to take into consideration the need of a carrier for mail compensation together with "all other revenue," we believe that we are not required by Section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy.

The Board concluded, on stated economic grounds, that the offset contended for by the Postmaster General should not be made. Accordingly, the Board found it unnecessary to reach the issues of whether the application of the profits to reduce the international rate would constitute a forbidden recapture of profits accruing under a final mail rate, as contended by the carrier and the rate division of the Board (R. 53); or whether the domestic profit was in fact excessive.[2]

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[2] In fixing the domestic rate, the Board stated (*Chicago and Southern A. L., Mail Rates*, 9 C.A.B. 786, 812):

> "An extra cushion against unforseen developments will be provided to the extent that C. & S. succeeds in developing additional revenues from express, freight, and incidental sources above the level forecast for the future

In determining not to reduce the international rate by the $654,000 in domestic profits, the Board found that: (1) since final mail rates cannot always be fixed simultaneously for both international and domestic divisions, the incentive for efficient air carrier operations which results from final rates is such as to justify the fixing of final rates for one division in advance of the other and a subsequent refusal either to make up losses or offset profits resulting under the final rate when fixing rates for

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period. Similarly, any economies which the carrier's management succeeds in accomplishing through effective cost controls or improved operating procedures and techniques, which serve to avert or mitigate anticipated increases in prices and to decrease operating costs below the unit cost of 116.6 cents per revenue plane-mile estimated herein, will inure to the carrier in the form of higher earnings."

The higher earnings realized by C. & S. were attributable to operating economies and various accounting adjustments made in the depreciation account to reflect subsequent changes in the service life of DC-3 and DC-4 aircraft (R. 65), rather than to substantial increases in traffic.

After considering and excluding the $654,000 domestic profit, the Board determined that total mail pay should be allowed for the international operations for the past period in the amount of $3,662,000 (R. 58). In so determining, the Board fixed the international "break-even need", i.e., the amount of money necessary to equalize income and outgo for the international division, at $3,122,000 (R. 19). Return on international investment at the rate of 7% was allowed in the amount of $393,000 (R. 23), and an allowance for actual tax liability was granted in the amount of $147,000 (R. 57). The reduction of the international allowance by the $654,000 in domestic profits, it will be noted, would have resulted in the total revenues, including mail pay, of the international division being less than the costs of operating that division.

The total return on investment for both domestic and international operations of C. & S., viewed together for the period involved, was 11%. Had the $654,000 been used to reduce the international mail pay, the total overall return would have been 7.3%.

the other division (R. 20, 21); (2) the comparative domestic status between domestic carriers having foreign routes and those which do not have foreign routes should be maintained by treating domestic and international operations as entirely separate, both for administrative reasons and so that uniform domestic class rates may be fixed for groups of domestic carriers under which there will be a competitive incentive for efficient domestic operations (R. 54, 55); and (3) domestic profits should not be required to be used to support economically weaker international operations in that such support will thwart the progress of domestic operations toward self-sufficiency and deprive the public of the advantages which will result from keeping the domestic industry in a financially sound position (R. 54).

The Court of Appeals, with Judge Prettyman dissenting, reversed the Board's order. The majority opinion, written by Judge Proctor and concurred in by Judge Bazelon, held that although the Board had authority to fix rates separately for different operating divisions, "the end result of fixing rates for a carrier must not go beyond that point where the total subsidy exceeds the need of the carrier as a whole" (R. 71). The majority opinion also characterized the Board's action as "initiating a new 'incentive' policy" (R. 71). Stating that the Board had theretofore held that the "need" of an air carrier for mail pay was "that of the air carrier as a whole and not that of any particular geographical division of its operations"

(R. 72), and equating the statutory phrase "take into consideration" as equivalent to "offset," the majority stated (R. 72)

> We agree with those pronouncements of the Board. We think they correctly indicate the duty of the Board in fixing "fair and reasonable rates of compensation" under § 406(b) in each case to "take into consideration, among other factors * * * all other revenue of the air carrier.[3]

Judge Prettyman would have affirmed the Board's order (R. 76). His dissenting opinion (R. 73) points out that, under the decision of this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601, the fixing of mail compensation is "a rate-making process" (R. 75). As such, he believed that the Board had statutory authority to fix entirely separate rates for the domestic and international services, and that the "other revenue" which the Board should take into consideration in fixing these separate rates is "revenue related to that service for which

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[3] In concurring in this decision (R. 73), Judge Bazelon indicated by reference to his concurring opinion in *Summerfield et al.* v. *Civil Aeronautics Board*, Nos. 11259, 11324, that, in his view, rate-making principles are unsuited for application to subsidy mail rates, and that the statute should be amended to differentiate between compensation for the carrying of the mail and need payments to subsidize the development of air transportation. Stating that the Board's action might well represent "a highly desirable economic objective", he thought it impossible for a Board or a Court to determine whether the $654 000 profit was the result of an excessive domestic subsidy rate or attributable to managerial efficiency on the part of C. & S. He was unwilling to "impute to Congress an intent that the Board should chart its course without such essential information."

the rate is being fixed" (R. 76). If in error as to this view, he was of the further opinion "that the elastic statutory phrase 'take into consideration' is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration" (R. 76).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that Section 406 of the Act mandatorily required the reduction of the mail rate for C. & S.'s international division by the amount of profit above a 7.4% return on investment which had been earned under the final mail rate for the domestic division.

(2) In holding that, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Act requires the Board to reduce an otherwise "fair and reasonable" mail rate for one division by deducting profits above a stated fair return on investment which have been earned or are anticipated to be earned from the operations of the other division.

(3) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority to refuse in appropriate cases, for reasons of regulatory policy, to reduce mail pay allowances by certain categories of "other revenue".

(4) In holding that the Board's refusal to reduce C. & S.'s international mail pay allowance by

deducting the profits above a 7.4% return on investment earned under the final domestic mail rate constituted a "new 'incentive' policy."

(5) In holding that prior rulings of the Board required the deduction of the domestic profits above a 7.4% return on investment from the international mail pay allowance.

(6) In reversing the order of the Board.

SUMMARY OF ARGUMENT

I

One of the principal purposes of the Civil Aeronautics Act, and one of the primary duties of the Board thereunder, is the maintenance and development of a sound and adequate air transportation system (Section 2, *infra,* p. 45). For the furtherance of this objective, the Act provides for financial assistance to air carriers in the form of mail pay to be fixed by the Board under Section 406 (*infra,* p. 46). This mail pay, which may include subsidy elements, is to be fixed in accordance with rate-making principles. *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601. The rate-making principle of establishing, in appropriate cases, separate rate-making units for domestic and international operations of carriers engaged in both types of operations, and the fixing of mail rates for each division independently of the other, are deemed by the Board to be essential to the statutory objective of maintaining and developing a sound air transportation system.

International operations presently require sub-

sidy support. The domestic operations of the carriers comprised of both international and domestic operating divisions do not now require such support, and the carriers are paid domestically under class service mail rates which also are applicable to other air carriers who operate only domestically. Because of the differing factors affecting domestic and international operations, it is extremely difficult for the Board to fix a system rate for carriers comprised of both divisions, or to fix final rates for both divisions simultaneously. Yet maximum operating efficiency on the part of air carriers, and the development of air transportation, are promoted by placing and retaining carriers on final mail rates under which they either reap the benefits or stand the losses from future operations. Where those final rates are class service rates, as is now the case with domestic operations, additional benefits are obtained in that the carriers are forced to compete domestically with other carriers of their class in securing revenue and in reducing or controlling costs.

Under these circumstances, the Board believes that the air transportation system will be benefited by the fixing of final rates for the domestic divisions in advance of the international ones, rather than by retaining the entire air carrier systems on a temporary or cost-plus basis during the lengthy period required for the fixing of a final system rate or for the simultaneous fixing of final division rates. Moreover, even if the entire air carrier systems are used as the rate-making units, present

domestic earnings will not support international operations, and it may be expected that the carriers will simply become subsidized on a system rather than on a division basis. This result will carry no long-range attendant benefits, and will merely serve to destroy the benefits which presently flow from the Board's classification and rate-making policies. In addition, domestic earnings will no longer be available for use in providing improved domestic services and for reducing domestic rates.

The treating of the entire air carrier system as the rate-making unit also will be discriminatory between carriers. The carriers engaged in only domestic operations will be permitted to retain their profits, whereas those engaged in both types of operations will be required to use domestic profits for the support of losing international operations. Under these circumstances, they probably will attempt to withdraw from international operations, and the Board may find it necessary to authorize that withdrawal since a reluctant operator can hardly be expected to serve the best interests of the United States in the international field. The routes operated by them presumably must be operated by some carrier in accordance with present government policy. Carriers operating both domestically and internationally can operate both types of services more economically than can entirely separate carriers, and the substitution of entirely new carriers for the present ones would not result in any savings to the government. Neither would the public interest be served by the

alternatives of permitting a single United States international carrier to operate all United States flag international service, or the certification of surface carriers for international air operations.

II

The complete separation of domestic from international operations is well within the Board's statutory authority. Section 416(a) (*infra,* p. 48) empowers the Board to classify carriers according to the "nature of the services performed," and Section 406 authorizes the fixing "from time to time" of "different [mail rates] for different air carriers or classes of air carriers, and different classes of service." Moreover, all rate-making agencies are vested with sound discretionary authority to establish rate-making units in appropriate cases within a single corporate utility system. *American Toll Bridge Co.* v. *Railroad Commission of California,* 307 U.S. 486, 494; *Illinois Commerce Commission* v. *United States,* 292 U.S. 474, 486; *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, 497, 498. Where a rate-making unit reasonably is established under the Board's classification powers, the Board may regard that unit as the "air carrier" for purposes of Section 406. If the statutory requirement to "take into consideration * * * all other revenue of the air carrier" is equivalent to a command to offset all other revenue, the Board need offset only that other revenue attributable to the rate-making unit or class of service involved.

If the term air carrier as used in Section 406

relates in all cases to the entire air carrier system, the Board still is not mandatorily required to reduce mail pay allowances by all of the other revenue. The "need" to which reference is made in Section 406 embraces the public need for a sound and adequate air transportation system as well as the private revenue need of an air carrier. The statute speaks in terms of enabling the carrier to "maintain and continue the development of air transportation," and not in terms of merely enabling the carrier to maintain an existing operation. The statute does not speak of offsets or deductions of "other revenue." Rather, the "other revenue" is simply a factor which the Board "shall take into consideration" in determining the amount of mail pay necessary for the furtherance of the statutory goal of developing a sound and adequate air transportation system. The weight to be given this factor is left to the sound judgment of the Board. *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 611, 612; *New York* v. *United States,* 331 U.S. 284, 345-349.

The Board considered all required factors in fixing the rate for C. & S., including the "other revenue" and the overall purposes of the Act embodied in Sections 2 and 406. It found the international mail pay allowance to be "fair and reasonable" in the light of these factors. The finding that the "other revenue" should be excluded is the equivalent of the finding insisted upon by the Postmaster General that there was "need" for the additional compensation provided in this manner. The car-

rier had need for the allowance so that it would have an incentive for conducting efficient domestic operations and for vigorously promoting and developing international services. There was a public need for the Board's action so that a sound and adequate air transportation system might be developed.

ARGUMENT

I. The Board's Order Furthers the Objectives of the Civil Aeronautics Act

A. *The applicable statutory provisions and their purposes*

Prior to the passage of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 et seq.), there was no comprehensive statutory scheme for the overall development and regulation of this nation's air transportation system. Various preliminary developmental and regulatory steps had been taken, however, as the art of flight developed and as Congress became increasingly aware of the importance of civil air transport to commerce and defense needs. The Air Commerce Act of 1926 (44 Stat. 568) had imposed safety control, and also had provided for governmental assistance in the form of navigational aids and other operating facilities. Beginning in 1925 and continuing to 1938, a series of statutes had provided a measure of direct financial assistance to the airlines in the form of compensation for the transportation of air mail under contracts let by the Post Office Department, and these statutes also provided for some economic regula-

tory control over air mail contractors.[4] In the Air Mail Act of 1934, provision also had been made for the establishing of a Federal Aviation Commission to report to the Congress by February 1, 1935 its recommendations for a broad governmental policy covering all phases of aviation (48 Stat. 938).

Subsequent to the report of this Commission (Sen. Doc. No. 15, 74th Cong., 1st Sess.), which had recommended affirmative legislative steps for the fostering and developing of the new medium of transportation, including the payment of subsidies, numerous aviation regulatory bills were introduced into the 74th and 75th Congresses, and extended hearings were held thereon. The Report of the Federal Aviation Commission, these hearings, and the Congressional debates which preceded the passage of the Act, all disclose that the infant air transportation industry was in critical straits, due in part to the need for additional revenues and in part to the lack of any adequate and stable governmental regulatory policy.[5]

As the culmination of these proposals, the Civil Aeronautics Act of 1938 was adopted. The Act supplanted for the most part the various aviation

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[4] Air Mail Act of 1925, 43 Stat. 805, as amended 44 Stat. 692, 46 Stat. 259; Air Mail Act of 1934, 48 Stat. 933, as amended 48 Stat. 1243, 49 Stat. 30, 49 Stat. 614, 52 Stat. 6, 52 Stat. 218.

[5] See *e.g.*, 83 Cong. Record 6405, 6507, 6627, 6631, 6634, 6635; Hearings before the Committee on Interstate and Foreign Commerce, House of Rep., 75th Cong., 3rd Sess., on H.R. 9738, pp. 298-301, 337-338; Hearings before the Committee on Interstate and Foreign Commerce, House of Rep., 75th Cong., 1st Sess., on H.R. 5234 and H.R. 4652, p. 40; Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess., pp. 43-97.

statutes heretofore mentioned (See 52 Stat. 1028, 1029), and embodied a comprehensive and stable scheme for the development and regulation of air transportation both from a safety and economic standpoint. The Congressional declaration of policy, as well as the legislative history, discloses that one of the primary purposes of the Act and duties of the Board is the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense" (Section 2(a), *infra,* p. 45). The Congress conceived such a system to be one from which the public would receive safe and "adequate, economical, and efficient service" under regulation designed to "foster sound economic conditions" in the industry. (Sections 2(b) and 2(c), *infra,* p. 45. It sought to prevent monopolies and to insure that degree of competition necessary for the growth of a healthy transportation system both domestically and internationally (Section 2(d), *infra,* p. 45). It was particularly concerned with the leadership of this nation in international civil aviation, and with the defense and international relations potentials of air transport.[6]

Full public utility control over air carriers was imposed by the Act to the end that these statutory objectives might be achieved. Appropriate author-

[6] See *e.g.,* the statements in the Congressional debates by Congressman Boren (83 Cong. Record 6405), by Congressman Randolph (83 Cong. Record 6507), and by Senator McCarran (83 Cong. Record 6635).

ity was conferred upon the President to act with respect to specified matters involving international air transportation (Section 801, 49 U.S.C. 601, see *Chicago & Southern Air Lines, Inc.*, v. *Waterman Steamship Corp.*, 333 U.S. 103). Broad administrative powers also were conferred upon the Board (Section 205(a) *infra*, p. 46), including the specific power to establish classifications of air carriers for regulatory purposes "as the nature of the services performed by such air carriers shall require * * *" (Section 416(a), *infra*, p. 48).

Since the industry had not reached the stage of economic self-sufficiency, the Congress also provided a method for financial assistance to air carriers. The recommendation of the Federal Aviation Commission for direct subsidies was not followed, however. Rather, financial assistance was to be provided in the form of mail rates to be fixed by the Board under the provisions of Section 406 (*infra*, p. 46), at a level which will enable the carrier "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." Section 406 also reflects the various classification and administrative powers otherwise conferred upon the Board. The section leaves to the Board the determination of the appropriate "method or methods" for ascertaining "rates of compensation for each air carrier or class of air carriers," and provides that the Board "from time to time" may "fix different rates for different air

carriers or classes of air carriers, and different classes of service." In short, complete rate-making powers are conferred, and complete administrative flexibility is provided.

Financial assistance in the form of mail rates, rather than by direct subsidy, was selected by Congress in part because it represented the traditional method of governmental support for air transportation and because it was realized that mail compensation would be an important part of the carriers' revenues even though that compensation might constitute only a fair return on investment allocated to the mail service.[7] In equal part, we believe, this method of assistance was provided because it carried with it the benefits and incentives for efficient operations which flow from rates, and because the Congress believed that rate-fixing techniques in the administration of what is termed subsidy mail pay would insure a more rapid realization of the statutory goals.

The bases for this belief have heretofore been

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[7] The Board has developed two types of mail rates under Section 406. One is the service rate, designed to provide compensation for the service of transporting the mail, an important and substantial part of a carrier's traffic. This rate is fixed in terms of rates for mail actually transported, such as, for example, 45 cents per mail ton-mile. See *e.g., Eastern A. L., Mail Rates*, 6 C.A.B. 551 (1945); *Transcontinental & Western Air, Inc., Mail Rates*, 6 C.A.B. 595 (1945). The other is the so-called subsidy or need rate. This latter rate is fixed at a level greater than that necessary to provide a fair return on investment allocated to the mail service, and customarily is fixed in terms of a formula geared to aircraft miles flown. See *e.g.*, R. 33; *Chicago and Southern A. L. Mail Rates*, 9 C.A.B. 786 (1948). Both the domestic and international rates of C. & S. here involved were need rates.

fully advanced to this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601, and will not be repeated here. That decision firmly established, in our view, that Congress did not intend to break with the "traditions of rate-making" in providing financial assistance to air carriers (336 U.S. at p. 605), and that rate-fixing techniques in the administration of the mail pay provisions are an integral part of the regulatory scheme. Our point at this stage of the brief is that these provisions were designed and intended to be used, to the extent that their terms and rate-making principles permit, for the achieving of the objectives specified in the Congressional declaration of policy contained in Section 2 (*infra,* p. 45) and repeated in Section 406 (*infra,* p. 48). This fact has heretofore been recognized in the *Transcontinental & Western Air* case, just as the rate-making powers of the Interstate Commerce Commission have been recognized as an appropriate means for furthering the National Transportation Policy. See, e.g., *King* v. *United States,* 344 U.S. 254, 263, 264; *Baltimore & Ohio Railroad Co.* v. *United States,* 345 U.S. 146, 150; *cf. New York* v. *United States,* 331 U.S. 284, 345-349.

B. *The reasons for the Board's order*

The principle urged upon the Board by the Postmaster General and accepted as law by the Court of Appeals in substance is that the entire air carrier system of any corporate air carrier must be regarded as a single unit for need or subsidy

purposes, and that the Board cannot grant need mail pay for the operation of one division so long as the carrier has or reasonably may anticipate revenues from another division which can be used to sustain the operation. The principle makes no distinction between profits obtained under final or temporary divisional rates, or between profits from need or service rates. It applies to rates fixed for future periods as well as to rates for past periods.[8]

The Board was, and is, of the opinion that "the principles of the Act will not be best served now" by the acceptance of the Postmaster General's position (R. 21). See, also, *Delta Air Lines, Inc., Mail Rates, Latin American Operations,* C.A.B. Order No. E-7738, Docket No. 6110, September 21, 1953. The reasons for this conclusion can best be explained against the background of present conditions in the air transportation industry.

Four of the thirteen domestic trunk lines (T.W.A., Braniff, Delta-C. & S., and Northwest) presently are engaged in both domestic and international operations which are classified by the Board

[8] The Postmaster General is contending before the Board that domestic profits obtained under service rates by TWA and Braniff must be used to reduce the carriers' international mail pay allowances for past periods, and that a final need rate for a future period for the international operations of Delta-C. & S. must be reduced through the application of anticipated future domestic earnings above a stated rate of fair return under a final domestic service rate. The Board thus far has declined to accede to these contentions, and has adhered to the principles enunciated in this case. *Braniff Final Mail Rate Case,* C.A.B. Order No. E-7815, Docket No. 5142, October 13, 1953; *Delta Air Lines, Inc., Mail Rates, Latin American Operations,* C.A.B. Order No. E-7738, Docket No. 6110, September 21, 1953.

as separate units for rate-making purposes.[9] TWA operates a trans-Atlantic route from New York to India via London, Paris, Rome, Cairo and the Middle East.[10] Northwest operates a route to the Orient via Alaska and Tokyo.[11] Braniff operates a

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[9] Five other carriers (American, Eastern, United, National and Colonial) conduct foreign or overseas operations which in the past have been regarded as separate units for rate-making purposes but which presently are regarded as "stub-end" operations sufficiently integrated with domestic operations so as to make feasible the fixing of rates on a system basis. See C.A.B. Publication "Administrative Separation of Subsidy From Total Mail Payments to United States International, Overseas and Territorial Air Carriers", 1952, pp. 7 and 8.

The Board has summarized its criteria for determining whether domestic and international operations shall be regarded as separate units or as a single unit for rate-making purposes as follows (*National Airlines Mail Rate*, Order No. E-6344, dated April 21, 1952):

> "There have been various criteria developed to guide the Board's determination of whether a single rate should be set for the foreign operations of a domestic carrier. One is the size of the foreign operation in relation to the total operations of the given carrier; another, the absolute size of the foreign operations; and a third, the extent to which the foreign operations are integrated with the domestic. To establish grounds for separate treatment it must be demonstrated that the foreign operations are large relative to the domestic operations of the carrier; that the foreign operations are so large that it would be neither practical nor feasible to attempt to set a system rate; and that the domestic and foreign operations are carried on more or less independently of each other."

The domestic and international operations of TWA, Braniff, Delta-C. & S. and Northwest are such, in the Board's view, as to warrant their being treated as separate for rate-making purposes. The reasonableness of the Board's action in classifying C. & S.'s divisions as separate for administrative purposes was not challenged below.

[10] *Northeast Air, Et Al., North Atlantic Routes*, 6 C.A.B. 319 (1945); *North Atlantic Route Transfer Case*, 11 C.A.B. 676 (1950); *North Atlantic Certificate Renewal Case*, C.A.B. Opinion and Order E-6560, Docket No. 5065, June 16, 1952.

[11] *Northwest Airlines, Inc., Et Al., Pacific Case*, 7 C.A.B. 209 (1946); 7 C.A.B. 599 (1946).

route between the United States and Brazil and Buenos Aires via Havana, Balboa, and the west coast of South America.[12] Delta-C. & S. operates through the Caribbean area to Venezuela and San Juan.[13]

International operations are affected by unsettled world conditions, by operating problems not present in domestic operations, and by strong competition from government-owned foreign flag carriers brought about in large measure by the need for granting reciprocal operating rights. Moreover, as this Court recognized in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 108, ". . . aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations. . . ." Defense and international relations considerations, rather than purely economic considerations, often largely determine whether a particular international operation shall be conducted. All of these factors add to the necessity for subsidy support.[14] The international operations of all four carriers, together with those of Pan American and Panagra, presently are subsidized, and the Board has esti-

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[12] *Additional Service to Latin America*, 6 C.A.B. 857 (1946).

[13] *Ibid; Delta-Chicago and Southern Merger Case*, C.A.B. Order E-7052, Docket No. 5546, December 24, 1952.

[14] The international operations of TWA, Braniff, Delta-C. & S., and Northwest comprise important links in the organization of United States flag international service. They are operated and subsidy is provided for that purpose in large measure because of the relationship of such operations to the security and welfare of the United States.

mated that such support will be required for some time to come.[15]

The carriers' domestic operations, however, presently are not subsidized, and are conducted under service mail rates applicable to other domestic operations. TWA is classified with American, Eastern and United as the "big Four" carriers now paid at the lowest service rate for domestic operations, presently 45 cents per mail ton-mile.[16] Delta-C. & S., Braniff, and Northwest are classified with three other domestic carriers (Capital, National and Western) as falling within the group now paid at a service rate of 53 cents per mail ton-mile.

If the domestic operations are not kept separate from the international ones, it will be extremely difficult for the Board ever to obtain the benefits which flow from any type of final rates in the cases of TWA, Braniff, Delta-C. & S., and Northwest. As the Board pointed out (R. 20), the different problems involved in fixing domestic and international rates are such that final domestic rates can be fixed more promptly than international ones. The factors affecting international operations also make it virtually impossible to fix any system rate which can be expected to continue for any extended period of time for the four carriers comprised of both domestic and international divisions (R. 20). Further, it is difficult from an ad-

[15] See C.A.B. Publication "Administrative Separation of Subsidy from Total Mail Payments to United States International, Overseas and Territorial Air Carriers", 1952, p. 4.

[16] See C.A.B. Publication "Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers", October 1952 Revision, Appendix 3.

ministrative standpoint either to fix a system rate or to simultaneously fix final rates for both divisions in which a balance may be struck between either past or projected divisional operations (R. 20). The Board thus has little practical choice other than to retain the carriers on what amounts to a cost-plus system basis for extended periods of time, or to fix final rates on a divisional basis as rapidly as possible. It has elected to follow the latter course of action.

In the instant case, it fixed a final need rate for C. & S. so that the carrier would have an incentive for efficient domestic operations. Under present conditions, still further benefits are obtained in that the carriers comprised of both domestic and international divisions conduct their domestic operations under class service rates which force them to compete with other carriers of their class in securing revenues and in reducing or controlling costs. These benefits can not be realized as a practical matter if the entire air carrier system is to be used as the rate-making unit.

It is no answer to say, as did the Postmaster General below, that the Board may continue its present classification procedures and continue to fix rates separately for the operating divisions as an administrative matter, including class service rates for domestic operations. In the first place, a rate which is final only in the sense that the carrier bears the losses resulting therefrom does not promote the same operating efficiency and economy, and consequent development of air transportation,

that flows from a rate which is truly final and under which the carrier reaps the benefit as well as standing the loss.[17]

Secondly, if the entire air carrier system is to be used as the ultimate rate-making unit, we believe that TWA, Braniff, Delta-C. & S., and Northwest would soon be removed from their status as domestic service rate carriers, assuming that they continue to operate in the international field. Present and foreseeable conditions in air transportation are such that the domestic earnings of these carriers under their existing service rates will be insufficient to support their international operations. As the Board found (R. 54), the carrying of inter-

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[17] We interpret the decision by this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601, as precluding the making up of losses which occur under a final division rate when fixing rates for the other division. There TWA was operating under a final domestic rate and under a temporary international rate when the domestic losses occurred. The Board stated that "TWA's domestic and international operations are separate units for rate-making purposes", and indicated that it lacked power to fix a system rate which would encompass both operating divisions retroactive to the time of the institution of the international rate proceeding. *Pennsylvania Cent. Air, Et Al., Motions*, 8 C.A.B. 685, 703 (1947). We realize that this precise point was not urged to the Court in the *TWA* case. Nonetheless, we think the principles there enunciated with respect to making up losses are equally applicable to both division and system rates. Moreover, if the Board had power to make up TWA's losses in fixing a final rate for the international operations, the *TWA* litigation was no more than an exercise in semantics.

The Postmaster General argued below, and the Court of Appeals tacitly assumed, that a distinction exists between making up losses and determining the amount of additional compensation needed, and that "offset" is not "recapture." Whatever may be the Board's power with respect to making offsets of the type under discussion, it has not yet chosen to follow that course of action.

national operations on the back of domestic operations would be "subjecting the latter to an unjustifiable strain." Under these circumstances the carriers presently must be subsidized on either a division or a system basis. While the immediate subsidy bill would be lower if the entire air carrier system were used as the rate-making unit, the incentive for efficient domestic operations would be destroyed. No benefit would result to the carrier from reducing or controlling domestic costs. Rather, the easy road would be to become permanently subsidized on a system basis, a course of action not calculated to save the government money in the long run. Further, the Board's classification procedures with their benefits to the Board for use in comparative rate-making techniques would be largely eliminated. The combined domestic and international operations obviously would be dissimilar to either the domestic or international operations of the carriers with which they presently compete.

There are other benefits to the domestic system which flow from the separation of domestic and international operations. The carriers under discussion operate a substantial segment of the domestic air transportation system. The retention of domestic profits for the benefit of domestic operations permits the carriers to obtain more modern aircraft and otherwise to offer improved domestic services to the public. The Board is of the view that these profits should be retained for that purpose (R. 54). Keeping the domestic industry in a sound financial position also will further the ulti-

mate goals of permanently eliminating subsidy from domestic trunk line operations, and of reducing domestic commercial rates with new impetus to the development of the domestic industry (R. 54).

International operations and government policies also will be affected under the Postmaster General's policy. Domestic commercial rates for passengers and property must be maintained at approximately the same level for all of the trunk line carriers for competitive reasons. TWA, Braniff, Delta-C. & S., and Northwest all compete domestically with other trunkline carriers engaged predominantly or entirely in only domestic operations, many of which either do not require subsidy support or are rapidly approaching that stage. If domestic profits must be used to support the losing international operations, then the carriers will not obtain the same profits realized by their competitors. Under these circumstances, the domestic carriers will no longer desire to continue or expand their international operations, nor will other domestic carriers care to enter the international field.[18] This desire will not stem entirely from the immediate profit motive. Airline operations are intensely competitive, and the carriers can hardly

[18] The Board recently suggested a possible merger between Western Air Lines and Pacific Air Lines, a carrier conducting operations within Alaska and between Alaska and the United States. Western has indicated to the Board since the decision below that it is not interested in the prospect of any such merger if as a consequence it will be required to utilize any profits on its domestic operations to support operations to and within Alaska.

hope to hold their present domestic competitive positions if their profits are siphoned off for other purposes, and those of their competitors are not.

The Board may of course be able to require the carriers to continue their present international operations even if the views of the Postmaster General ultimately prevail. However, the type of operations and developmental activities which may be expected of a reluctant operator are hardly calculated to serve the best interests of the United States in the international field. A withdrawal of the present domestic operators from the international field or a failure on their part to expand or vigorously promote international operations will have serious consequences. Consistently with the policy against monopoly (Section 2(d), *infra*, p. 46), the established policy of this government is for more than one American flag carrier to operate internationally, and for competition between American flag carriers where possible. See *e.g., American Export Air, Transatlantic Service,* 2 C.A.B. 16 (1940); *Northeast Air, Et Al., North Atlantic Routes,* 6 C.A.B. 319 (1945); *North Atlantic Route Transfer Case,* 11 C.A.B. 676 (1950). The selection of domestic carriers to perform international service benefits international operations in that existing experienced headquarters staffs, trained operation crews and workers, and shops for the maintenance and repair of aircraft are immediately available and can be utilized in both operations. *Northeast Air, Et Al., North Atlantic Routes, supra,* 6 C.A.B. at pp. 326-327. The use of

these existing facilities, and the spread of overhead costs, enables both domestic and international operations to be performed more economically than would be possible if the operations were conducted by entirely separate carriers. Further, carriers engaged in both operations can provide a more convenient international service through the medium of single carrier service between all of the domestic and foreign points served by them than would be possible through interchange of traffic between separate carriers. *Additional Service to Latin America,* 6 C.A.B. 857, 900, 910 (1946).

These factors played an important part in the certification for international operations of Braniff, C. & S., Northwest and TWA. The alternatives to certificating a domestic carrier were (a) monopoly in the hands of a non-domestic air carrier; (b) operation by a new corporation organized for that purpose with inadequate financing and experience to immediately do the job required and with the prospect of greater costs to the government; or (c) operation by a surface carrier leading to a concentration of both surface and air transportation in the same hands contrary to established national policy. All of these alternatives were and remain undesirable to the public interest. Yet one of these alternatives may be required under the policy espoused by the Post Office Department and accepted as law by the Court of Appeals.

II. The Board's Order Is Within Statutory Authority

A. *The Civil Aeronautics Act authorizes the establishing of domestic and international operating divisions of the same air carrier as separate rate-making units, and the fixing of mail rates for one division without regard to the operations of the other*

Mail rates are to be fixed in accordance with rate-making principles. *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601. Moreover, Section 416(a) (*infra,* p. 48) empowers the Board to classify carriers according to the "nature of the services performed", and Section 406(b) (*infra,* p. 47) authorizes the fixing "from time to time" of "different [mail] rates for different air carriers or classes of air carriers, and different classes of service." These powers are consistent with the fundamental tenet of public utility law that regulatory agencies are vested with sound discretionary authority to determine appropriate units of rate making and to fix rates separately at a level which will sustain the particular unit. See *e.g., American Toll Bridge Co.* v. *Railroad Commission of California,* 307 U.S. 486, 494; *Illinois Commerce Commission* v. *United States,* 292 U.S. 474, 486; *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, 497, 498; *Gilchrist* v. *Interborough Co.,* 279 U.S. 159, 209-210.

Whether the question of statutory authority to fix entirely separate mail rates for domestic and international operating divisions is viewed as one

of treating the divisions as separate rate-making units, or of fixing separate rates for different classes of service as Judge Prettyman viewed the issue (R. 76), we believe the Board's power to be equally plain.[19] Where a rate-making unit is established under the Board's classification powers, we believe that the Board in its sound discretion may regard that unit as the "air carrier" under the so-called need provisions of the statute,[20] just as rate-making units of the type involved in the last cited cases (*supra*, p. 31) are regarded as the utility or carrier for which the rates are being fixed. If the problem is viewed as one of fixing rates for different classes of service as, for example, intrastate and interstate or other segregated services, the result should be the same. See *e.g., The Minnesota Rate Cases*, 230 U.S. 352, 435; *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 148; *Banton* v. *Belt Line Ry.*, 268 U.S. 413, 421; *Northern Pacific Ry.* v. *North Dakota*, 236 U.S. 585, 598.

In either case, if the statutory requirement to

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[19] The need mail rate is fixed on the basis of total operations included in the particular rate-making unit, and constitutes a single rate for the entire operations of that unit. Thus the questions of rate-making unit and fixing rates for separate classes of service are essentially the same.

[20] These are the provisions of Section 406(b) (*infra*, p. 47) which direct the Board, "in determining the rate in each case", to "take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

"take into consideration . . . all other revenue of the air carrier" is equivalent to a command to offset all other revenue, then, as Judge Prettyman pointed out in his dissent (R. 76), the Board need offset only that other revenue attributable to the rate-making unit or class of service involved. The inquiry may be restricted to whether the rate being fixed is fair and reasonable. If the rate for another division of the carrier is exorbitant, it may be reduced. *Cf. Northern Pacific Ry.* v. *North Dakota,* 236 U.S. 585, 598. The time and place to determine the reasonableness of the rate for the other division is in a direct proceeding for that purpose.[21]

No question has been raised concerning the reasonableness of the rate for C. & S.'s international operations, viewed alone. Moreover, the majority below recognized the "Board's authority to fix rates separately for different operating divisions of the carrier" (R. 71). We assume that there is little question but that the Board may establish entirely separate rate-making units for the determination of service mail rates, or for the fixing of commercial rates even though a rate-making factor in determining commercial rates also is "the need of each air carrier for revenue . . .". Section 1002(e), 49 U.S.C. 642(e). The majority of the Court of Appeals believed, however, that the term "need of each such air carrier" as used in Section

[21] The Board in fact instituted a proceeding to determine whether C. & S.'s domestic rate should be reduced (R. 53), and thereafter reduced the rate. See also R. 76.

406(b) related to the entire air carrier system. Where subsidy is involved in any portion of an air carrier's system, it construed the phrase to be a limitation upon the express administrative and rate-making powers conferred by other portions of Section 406 and other sections of the statute. It held that, in fixing subsidy pay, division rates must be fixed in the light of the carrier's overall system position.

It is not believed that a mere descriptive phrase such as "air carrier" can serve to override the other express powers conferred. We are aware of no legislative history which requires the construction of the majority, and there are no indicia on the face of the statute which compel that result. The statute does not distinguish between need and service rates, and the "method or methods" for fixing both need and service rates are expressly committed to the competence of the Board (Section 406(a), *infra,* p. 46, see, also, Section 205(a), *infra,* p. 46). Moreover, under the decision below, the Board cannot as a practical matter exercise its other express powers to classify air carriers (Section 416(a), *infra,* p. 48), and to fix "from time to time . . . different rates for different . . . classes of air carriers, and different classes of services" (Section 406, *infra,* p. 46). Yet Section 2(d) (*infra,* p. 45) "looks to the sound development of an air transportation system through competition", and the uniform class rate is an appropriate method of providing for this competitive development. *Transcontinental & Western Air,*

Inc. v. *Civil Aeronautics Board,* 336 U.S. 601, 606. Section 406 should be construed to "harmonize with the apparent design of the Act" (*ibid.*), and a construction is indicated which will accommodate these classification and rate-fixing powers and enable the Board to discharge its functions. See, also, *United States* v. *American Trucking Associations,* 310 U.S. 534, 542-544; *Gemsco, Inc.* v. *Walling,* 324 U.S. 244; *American Trucking Associations* v. *United States,* 344 U.S. 298.

Neither do we believe that the majority below were warranted in holding that the construction placed by them upon the statute accorded with the "established construction" of the Board (R. 72), or that the Board's action in this case constituted the initiation of a "new incentive policy" (R. 71). The Board consistently has followed the policy here involved of neither offsetting profits nor making up losses resulting from final division rates, and of otherwise treating domestic and international operations as separate in appropriate cases. The Board, it is true, has said "[t]he 'need' is that of the air carrier as a whole and not that of any particular geographical division of its operations." *Chicago and Southern A. L. Mail Rates,* 3 C.A.B. 161, 190 (1941). This statement was first made in rejecting the position of the Postmaster General that need mail pay on a system basis should be awarded only for those schedules and routes over which mail was actually transported. See, also, *Delta Air Corp., Mail Rates,* 3 C.A.B. 261, 271 (1942). The same statement has been repeated in

connection with the question of whether separate mail rates should be fixed for the different routes which collectively made up the system rate-making unit. *Eastern A. L., Mail Rates,* 3 C.A.B. 733, 739, 740 (1942); *Pennsylvania Cent. Air, Mail Rates,* 4 C.A.B. 22, 25 (1942).

Pan American's various international divisions are treated by the Board as separate rate-making units. In *Pan American Airways, Inc., Alaska Mail Rates,* 6 C.A.B. 61 (1944), also relied upon by the majority below (R. 72), a final rate was fixed for the Alaska Division. Holding that Pan American was entitled to its costs and a reasonable return on investment allocated to the mail service for the separate Alaska operations irrespective of its over-all system position (6 C.A.B. at p. 68), the Board determined the "service" mail pay to which it believed the carrier to be absolutely entitled. Repeating its statement in the *Chicago and Southern Case* that "need" embraced the need of the air carrier system rather than any particular geographical division (6 C.A.B. at p. 67), the Board determined not to allow subsidy mail pay which otherwise would have been provided because certain "excess earnings" in the Latin-American division were more than adequate to meet the carrier's need (6 C.A.B. at pp. 67 and 78). The same procedure was followed with respect to the carrier's Pacific Division (See 6 C.A.B. at p. 78). However, these "excess earnings" had resulted from payments received under a prior rate between the time of the

institution of a new rate proceeding and the Board's decision therein, and were subject to recapture.[22] The Board had determined, upon "economic considerations and considerations of policy," not to recapture these earnings except to the extent that they would be used to offset the carrier's subsequent subsidy need to be determined for other divisions. *Pan Am. Airways, Inc., Latin-American Mail Rates,* 3 C.A.B. 657, 668-70 (1942).

Thus, the actions by the Board upon which the majority relied below related to factual situations clearly distinguishable from the present case. The question of whether international and domestic operations should be treated as separate was not in issue in any of the cited cases. To the extent that the language used in these decisions is contrary to the present position of the Board, it is *dicta.*

There is nothing in any prior action by the Board or in the statute which warrants a denial to the Board of the ordinary rate-making power of establishing separate rate-making units and of fixing separate rates at a level which will sustain the particular unit irrespective of profits or losses which have occurred or may occur in another rate-making

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[22] Payments under a mail rate are continued after that rate is challenged until such time as a new rate is fixed. The new rate may be made retroactive to the date of the institution of the rate proceeding. *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601. Thus, payments during the intervening period which are in excess of those provided by the new rate may be recouped, just as the carrier may be allowed the difference for the intervening period when the new rate is fixed at a higher level.

unit. It goes without saying that this power may be exercised only for valid reasons, and that the validity of any particular classification is subject to judicial scrutiny. It is apparent also that the Board is not bound to follow its present classifications, and may change them as to rates for future periods as circumstances warrant.

We also note our belief that the Board's policy will not result in any likelihood of ultimate greater cost to the government than will occur from an application of the policy advocated by the Postmaster General. Where both divisions are subsidized, control may be maintained as readily on a division basis as on a system basis. Excess profits or substantial losses are just as likely to occur under system rates as under division rates, a fact apparently overlooked by Judge Bazelon in his concurring opinion.[23] We recognize a short-term benefit from the recapture of the profits here involved, and from the application of domestic profits under service rates to the support of international operations. Apart from questions of legal power to make these offsets, we believe that, under present conditions, the ultimate resulting cost and impairment to the development of the air transportation system would far outweigh these short-term benefits (See *supra*, pp. 20-30).

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[23] Air carrier revenues are subject to the same fluctuations as the revenues of other businesses, and a reasonable and representative period of time must elapse before it can be determined whether any rate, system or division, will prove either excessive or insufficient.

B. *The Civil Aeronautics Act confers discretionary authority upon the Board to decline in appropriate cases, for reasons of regulatory policy, to reduce mail pay allowances through the application of certain categories of "other revenue"*

If the Board may not regard the rate-making units as separate air carriers for mail pay purposes in appropriate cases, it still does not follow that revenues derived from domestic operations mandatorily must be used to reduce mail pay for international operations. Rather, we believe that Section 406 plainly confers discretionary authority in the Board to refuse to reduce mail pay allowances otherwise "fair and reasonable" through the application of certain categories of "other revenue" when that refusal is predicated upon sound reasons of regulatory policy.

Under the Postmaster General's view, a "need" mail rate must be limited to the level which will provide the minimum supplemental amount necessary to enable a carrier to maintain an existing or projected total operation and to obtain a stated fair rate of return on over-all investment. We think this concept of "need", accepted by the Court of Appeals in this case and rejected in the companion case involving Western, to be erroneous.[24] "Need"

[24] In the case involving Western, the Court of Appeals recognized that "[t]he statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation." *Summerfield et al.* v. *Civil Aeronautics Board*, Nos. 11259, 11324; p. 344 of the record in this Court in Cases 224 and 225.

means much more than the private revenue need of a carrier for supplemental income to sustain its operations. It embraces the public need for a sound and adequate air transportation system as well. The statute is "affirmative in its prescription," as Judge Prettyman pointed out (R. 76). It speaks in terms of enabling the carrier to "maintain and continue the development of air transportation," and not in terms of merely enabling the carrier to maintain an existing operation. "Need" is not described "as the remainder after all other revenue is deducted," nor does the statute speak of "offsets or deductions" (R. 76).

On the contrary, the "other revenue" of the carrier is simply a factor which the Board "shall take into consideration" in determining the amount of mail pay necessary for the furtherance of the statutory goal of developing a sound and adequate air transportation system. The phrase "take into consideration" is not equivalent to a command to offset all other revenue. It means merely what it says, that other revenues are to be considered in determining the mail pay allowance. The weight to be given to this factor is left to the sound judgment of the Board. See *e.g., Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 611, 612; *New York* v. *United States,* 331 U.S. 284, 345-349; *United States* v. *Interstate Commerce Commission,* 66 U.S. App. D.C. 398, 88 F. 2d 780, *cert den.,* 300 U.S. 684.

There are circumstances in which the development of air transportation requires the exclusion of certain types of "other revenue" in computing

individual mail pay allowances. One such circumstance is illustrated by the present case, where domestic earnings must be excluded from use in reducing international mail pay allowances so that the carriers will have an incentive both for conducting efficient domestic operations and for vigorously promoting and developing international services. To the extent that a refusal to reduce the international mail pay allowance by domestic profits may be regarded as equivalent to an increase in an otherwise "fair and reasonable" international rate, the carriers "need" the additional compensation so that they will act for the "development of air transportation." C. & S. had "need" for the domestic profits earned under its final domestic rate in that it otherwise would not have had the incentive for efficient domestic operations. The public "need" for a sound and adequate air transportation system also was served through the Board's refusal to make the offset. The "need" of the carrier and the public were coextensive.

Thus, the Board's finding that the particular category of "other revenue" should be excluded fulfills the requirement insisted on by the Postmaster General that there be a finding of need on the part of the carrier for the mail compensation granted. Actually, however, the only finding required by the Act is the finding that the rate fixed is "fair and reasonable" in the light of all of the factors to be considered. The Board considered all required factors, including "all other revenue" and the over-all purposes of the Act embodied in Sections 2 and 406. It found the international rate to be "fair and rea-

sonable" (R. 58). The statute required no more.

The Board has never considered "that a predetermined rate of return upon the so-called 'fair value' of the carrier's property is the measure of reasonableness" in fixing mail rates. *American Air, Mail Rates,* 3 C.A.B. 323, 337 (1942).[25] Rather, the Board consistently has considered that the "use of the mail payments is a statutory device for the accomplishment of national objectives . . ." *Ibid,* 3 C.A.B. at p. 335. It has used mail pay as the developmental tool for which it was intended, even though a particular carrier might obtain a private benefit which it was not entitled to demand.

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[25] Neither, may we add, is a predetermined rate of return the absolutely controlling factor in fixing other types of utility and carrier rates. Under accepted rate-making principles, a fair and reasonable rate need not be the lowest possible rate. See *e.g., Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575; *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 483; *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 422, 423. It is well recognized that a higher rate of return may be provided for incentive purposes. See *e.g., Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 291 (dissenting opinion by Mr. Justice Brandeis); *Idaho Power Co.* v. *Thompson,* 19 F. 2d 547, 561 (S.D. Idaho); *Petition of Public Service Coordinated Transport,* 5 N.J. 196, 74 A. 2d 580, 595. Indeed, this fact was recognized by the Court of Appeals in the companion case to this, wherein the Court stated that "[a]llowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making." *Summerfield et al.* v. *Civil Aeronautics Board,* p. 350 of record in Cases 224 and 225.

It is also well recognized that ordinary rate-making powers may be used for the purpose of accomplishing over-all statutory objectives and for meeting public needs. *King* v. *United States,* 344 U. S. 254, 263, 264; *Baltimore & Ohio Railroad Co.* v. *United States,* 345 U. S. 146, 150; *New York* v. *United States,* 331 U. S. 284, 345-349. The rate of return received by an individual carrier becomes even less significant in ordinary rate-making in cases in which public interests are

It has long employed "sliding-scale" need mail rates which have the effect of yielding a higher return on investment with increasing load factors or decreasing costs, thereby encouraging and rewarding carriers for efficient promotional activity and efficient operations. It has employed class service rates under which varying rates of return are realized by the carriers within the class according to their ability to control and reduce costs. It has refused to require carriers to refund need mail payments which were subject to recapture because the refunding of those payments would impede the progress of the carrier toward the goal of economic self-sufficiency. *Pan American-Grace Airways, Mail Rates,* 3 C.A.B. 550, 564 (1942); *Pan Am. Airways, Inc., Latin American Mail Rates,* 3 C.A.B. 657, 668 (1942); *American Airlines, Mail Rate Proceeding,* 3 C.A.B. 770, 776 (1942). Since the entry of domestic carriers into the international field, it consistently has treated the domestic and international divisions as entirely separate where classified as separate rate-making units. It has refused to offset profits or make up losses between the di-

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being served. For example, uniform commercial rates generally are recognized to be necessary so that all units of the transportation system may obtain traffic and thus survive for the public good. The fact that some carriers receive a greater rate of return under such rates than would otherwise be regarded as fair and reasonable has not been regarded as the controlling factor. *E. g., Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 484. Rates otherwise reasonable also may be raised where that action is necessary to equalize territorial rate structures and to prevent undue advantage to different sections of the Nation's economy contrary to the public interest. *New York* v. *United States,* 331 U. S. 284.

visions because that action would be inimical to the overriding statutory objective of developing a sound and adequate air transportation system.

This is the "established construction of the Act by the Board which should be given weight" (R. 72). The Act could hardly be construed otherwise, in our opinion. The entire purpose and focus of need payments are not simply to make a carrier financially whole in the usual sense, but to develop an air transportation system to serve paramount national interests. If that objective is to be accomplished, Section 406 cannot be administered in the manner of a public relief law. Neither its terms nor its purposes permit the construction advocated by the Postmaster General.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[26] are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-trans-

[26] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

portation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

GENERAL POWERS AND DUTIES OF THE [BOARD]

General Powers

SEC. 205 (a) The [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

RATES FOR TRANSPORTATION OF MAIL

AUTHORITY TO FIX RATES

SEC. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation

is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or

pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

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CLASSIFICATION AND EXEMPTION OF CARRIERS

CLASSIFICATION

SEC. 416 (a) The [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the [Board] finds necessary in the public interest.

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